CASE NOTES

ADMINISTRATIVE LAW—LOYALTY INVESTIGATIONS—SECURITY FIRINGS WITHOUT RIGHT OF REVIEW RESTRICTED TO "SENSITIVE" POSITIONS

Petitioner was discharged from his post as food and drug inspector in the Department of Health, Education and Welfare for security reasons, pursuant to statute, 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952). His appeal to the Civil Service Commission, under Veterans Preference Act, § 14, 58 STAT. 390 (1944), 5 U.S.C. § 863 (1952) was refused on the grounds that the act does not apply to such discharges. A declaratory judgment that this refusal was improper was denied by the district court. This was affirmed by the court of appeals, with one judge dissenting. On certiorari to the Supreme Court, *held,* reversed and remanded. The phrase "national security" as used in the statute, *supra,* restricted its application to those sensitive positions affecting internal security or protection from external attack. The President's executive order, Exec. Order No. 10450, 3 C.F.R. 72 (Supp. 1953) extending the act to all governmental agencies cannot apply to positions not found to be sensitive by the head of the department. As there was no such finding in this case, the statute does not apply, and petitioner was improperly refused his right of appeal as a preference eligible veteran. J. J. Clarke, Reed and Minton dissenting. *Cole v. Young,* 76 S.Ct. 861, 100 L.Ed. (Advance p. 851) (1956).

A government employee without tenure is subject to discharge at any time. *Ligare v. Harries,* 128 F.2d 582 (7th Cir. 1942). The right of appointment by the executive carries with it the right to dismiss. *Meyres v. United States,* 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). Congress may impose limitations on this power of removal in some cases. *Humphrey v. United States,* 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). Congress has provided that an employee eligible under the Veterans Preference Act may not be discharged without right of appeal to the Civil Service Commission. Veterans Preference Act, *supra.* This projection was removed, however, from discharges under the Security Act, which "Notwithstanding the provisions of *** any other law ***" gave the heads of certain specified departments the power to terminate the employment of civilian employees "*** in the interest of national security *** such determination shall be conclusive and final." 64 STAT. 476 (1950), 5 U.S.C. § 22-1 (1952). The

President under this act, extended it to all agencies of the Federal government. Exec. Order No. 10450, *supra*. In reporting on the bill before adoption, however, the committees repeatedly referred to the affected positions as those of a sensitive nature. H. R. Rep. No. 2330, 81st Cong. 2nd Sess. 4 (1950), S. Rep. No. 2158, 81st Cong. 2nd Sess. 2 (1950).

In the instant case, the court concluded that the act does not apply to all government jobs, and that the President cannot by executive order extend it beyond Congressional intent. This conclusion was based upon references in House and Senate reports to the "sensitive" nature of the positions affected, and on the fact that discharged employees were not denied re-employment in government service. In effect this decision limits summary, unreviewable firings by the heads of agencies to positions having a direct effect on national security. It does not pass upon the merits of the case against the employee involved. He may still be discharged by one of several regular administrative means. The court even left the door open for his discharge under this act, if the head of his department rules that his post is indeed a sensitive one. There does not seem to be any challenge to the basic right of the President to discharge administrative employees, as the dissenting opinion feared. The President issued the executive order extending the act, not under his general powers as Executive, but under a provision of the act itself. The instant case only states that the order cannot expand the act beyond its purpose and intent. The stigma of discharge as a security risk is such that the accused should be given every advantage of administrative review, except in cases where national security clearly requires summary discharge.

FRANK M. MCKENNEY

ANTI-TRUST—VIOLATION OF THE SHERMAN ACT—APPLICATION OF THE MARKET CONCEPT TO DETERMINE WHETHER A MONOPOLY EXISTS

E. I. du Pont de Nemours and Company was charged with violating a section of the Sherman Anti-Trust Act by having a monopoly in the production of cellophane. At the time suit was brought, du Pont was producing approximately three-fourths of the nation's supply of cellophane. But cellophane constituted only one-fifth of all flexible wrapping material. The decision turned upon the question of whether cellophane alone or the entire field of flexible wrapping material should be considered the relevant market. *Held*: In determining the

relevant market the court must consider whether there are substitute items and how much competition they give. In this case the proper market to be considered is that of flexible wrapping material. Du Pont does not have a monopoly. *United States v. E. I. du Pont de Nemours and Company* 76 S.Ct. 994, 100 L.Ed. (Advance p. 751) (1956).

The Sherman Anti-Trust Act § 2, 26 STAT. 209 (1890), 15 U.S.C. §2 (1952), makes it unlawful to "monopolize or attempt to monopolize . . . any part of trade or commerce among the several states." A monopoly is attained when an organization has sufficient power to crush competition or to exclude potential competition from a particular market. *United States v. Reading Company,* 253 U.S. 26, 40 S.Ct. 425, 64 L.Ed. 760 (1920). But all monopolies are not illegal. 58 C.J.S. *Monopolies* § 17 (statutory exceptions). A patent grants a legal monopoly. *United States v. General Electric Company,* 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926); and when a person or corporation attains dominance in a field solely because of superior technical skill or sale procedures, the advantage so gained is not illegal. *United States v. International Harvester Co.,* 274 U.S. 693, 47 S.Ct. 748, 71 L.Ed. 1302 (1927). While combination in itself does not violate the Sherman Act. *Appalachian Coals v. United States,* 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933), a combination becomes illegal if its purpose is restraint of trade, even if this purpose is not attained. *American Tobacco Company v. United States,* 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1945). And if monopoly or restraint of trade is the natural result of certain acts, specific intent need not be shown. *United States v. Griffith,* 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). "Bigness" alone is not prohibited. *United States v. United States Steel,* 251 U.S. 417, 40 S.Ct. 293, 64 L.Sd. 343 (1920). However large size carries with it an opportunity to abuse which cannot be ignored if it has been exercised in the past. *United States v. Swift & Company,* 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932). Early in the history of the anti-trust legislation the supreme court adopted the "Rule of Reason" as a test to determine whether an accused had in fact violated the law. *Standard Oil of New Jersey v. United States,* 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1910). The market concept plays an important part in the application of this rule. *The Market: A Concept in Anti-Trust,* 54 COLUM. L.R. 580 (1954). Before it can be determined whether a corporation has a monopoly, the market in which it operates must be designated. *United States v. Corn Products Refining Company,* 234 F. 964 (S.D. N. Y. 1916) *appeal dismissed on appellant's motion* 249 U.S. 621, 39 S.Ct.

291, 63 L.Ed. 805 (1919). Market determination is based on several factors: the "cross-elasticity" or functional interchangability of products, *United States v. Yellow Cab Company,* 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947); whether the products are sold in the same geographical area, *United States v. Lorane Journal,* 92 F. Supp. 794 (N.D. Ohio 1950) *aff'd* 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 179 (1951); whether quality or other considerations cause nominally interchangable items to be purchased by entirely different consumer groups, *International Shoe Company v. F.T.C.,* 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431 (1930). In short, the question is whether the products in question compete for the same purchaser group. *Times Picayune Publishing Company v. United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). One type of men's shoes may be in a different market from another type because difference in quality causes them to appeal to different buyers. *International Shoe Company v. F.T.C.,* 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431 (1930). But expensive original design dresses have been held to be in competition with cheaper "copies." *Fashion Original Guild of America v. F.T.C.,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941). Color film is a sperate market from black and white, *Eastman Kodak Company v. F.T.C.,* 158 F.2d 592, *cert. den.* 330 U.S. 828, 67 S.Ct. 869, 91 L.Ed. 1277 (1947). The "virgin" or newly refined aluminum market was considered without regard to competition from "secondary" or re-used aluminum because control of the first market necessarily carries with it power to affect the second. *United States v. Aluminum Company of America,* 148 F.2d 416 (2d Cir. 1945). This is consistent with the view that "first run" pictures constitute a market. *United States v. Paramount Pictures,* 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948). While two types of syrups have been considered in different markets because of different glucose percentages, *United States v. Corn Products Refining Company, supra,* all fruit and vegetable juices sold through grocery stores are considered competitive. *Bruce's Juices v. Amer. Can Company,* 87 F. Supp. 985 (S.D. Fla. 1949) aff'd 187 F.2d 919 (5th Cir.) *cert. den.* 342 U.S. 875, 72 S.Ct. 165, 96 L.Ed. 657 (1951). Essential fact differences seriously impair the value of analogies between industries, *Maple Floor's Manufacturers Association v. United States,* 268 U.S. 563, 45 S.Ct. 578, 69 L.Ed. 1093 (1925). It can be stated as a general rule that when substantial competition, actual or potential, is found between items, they should be considered in the same market. *United States v. Yellow Cab Company, supra.*

The determination of the market involved in an anti-trust suit can become quite difficult. Because of wide differences in situation,

analogy from case to case is of little help. Each case must be decided on the basis of its own fact situation. In the instant case, the established rules governing the determination of a market were applied, and the decision is consistent with prior cases in the field.

B. C. BUICE

CORPORATIONS—NON-CUMULATIVE PREFERRED STOCK—APPLICATION OF DIVIDEND CREDIT RULE

Five preferred non-cumulative stockholders asked for a declaratory judgment establishing their rights to accumulated dividends and their equity in earned surplus in preference to common stockholders. For several years annual earnings in defendant company had been in excess of the amount necessary to pay the 6% non-cumulative dividend on 100,000 shares of preferred stock, yet no dividends had been paid on said stock for those years. Instead, the board of directors had reserved the net income of those years for working capital, subsequently expending such reserve in the business of the corporation. The trial court denied the declaratory judgment on the grounds that: 1) since the present surplus was not a fixed amount but was constantly changing with the needs of the business, it was impossible to determine plaintiffs' interest is an unknown; and 2) since plaintiffs did not contend that a declaration of dividend on common stock was contemplated by the board of directors, no controversy was presented to the court. On appeal, *held*: affirmed. If a dividend on common stock was declared out of the surplus, the New Jersey dividend credit rule would apply and give the non-cumulative stock a preference; the dividend credit rule is not limited to cases where undistributed profits have been retained in cash or readily convertible assets, but may be applied to instances where such profits have been turned into working capital and actually used in a corporation's business operations. *Sanders v. Cuba Railroad Company,* 21 N.J. 78, 120 A.2d 849 (1956).

The majority rule is that if earned dividends are not declared, but are retained by the board of directors in accord with wise administration of a business, then non-cumulative preferred stockholders may not recover dividends from such funds. *Wabash Railway Co. v. Barclay,* 280 U.S. 197, 50 S.Ct. 106, 74 L.Ed. 368 (1930). The directors can retain annual earnings for *any* appropriate purpose; and once the dividend is passed up and not declared by the board, and that

year is gone, the dividend is lost forever, even though directors might decide to compensate non-cumulative stock for earlier withholdings at a later date. *Guttmann v. Illinois Central Railroad Co.*, 189 F.2d 927 (2nd Cir. 1951). See: *Dividend Rights of Non-Cumulative Stock*, 61 YALE L. J. 245 (1952).

The New Jersey dividend credit rule (or "Cast Iron Pipe" doctrine) is that where a reserve fund is set up with surplus net profits from which dividends on non-cumulative preferred were to have been paid, such reserve fund can be used to pay subsequent dividends on such stock. *Bassett v. United States Cast Iron Pipe and Foundry Co.*, 75 N.J.E. 539, 73 A. 514 (1909). The preferred right of non-cumulative dividends applies until all the withheld profits applicable to payment of such dividends have been paid, and such right is not limited to only the years when profits are sufficient to pay dividends on both preferred and common stock. *Moran v. United States Cast Iron Pipe and Foundry Co.*, 95 N.J.E. 389, 123 A. 546 (1924). Under the New Jersey rule, as long as there are earnings in any given fiscal period, the non-cumulative preferred stock has an equity in that sum to the extent of its preferred dividend. Berle, *Non-Cumulative Preferred Stock*, 23 COLUM. L. REV. 358 (1923). See also: *Day v. United States Cast Iron Pipe and Foundry Co., supra;* Lattin, *Is Non-Cumulative Preferred Stock In Fact Preferred?*, 25 ILL. L. REV. 148 (1930). But the declaration of a dividend lies wholly in the sound business discretion of the directorate. *Agnew v. American Ice Co.*, 2 N.J. 291, 66 A.2d 330 (1949). If retained profits are utilized in normal and ordinary business operations the non-cumulative preferred right no longer exists. *Dohme v. Pacific Coast Co.*, 5 N.J. Super. 477, 68 A.2d 490 (1949); *Agnew v. American Ice Co., supra.*

The *Agnew* and *Dohme* cases, *supra,* so qualified the dividend credit rule that any directorate with imagination could circumvent the doctrine. *Dividend Rights of Non-Cumulative Stock*, 61 YALE L.J. 245, *supra.* But dictum in the instant case repudiates those qualifications and extends the rule to include funds actually spent in business operations—the very circumstance *Agnew* and *Dohme* referred to. Although the instant case shows a renewal of faith in the dividend credit rule, the only safe solution would seem to be an explicit enumeration of rights of the stock in the articles of incorporation, and on the stock itself.

RICHARD H. MILLS

FEDERAL CRIMINAL LAW—CONTEMPT—ATTORNEYS AS OFFICERS OF THE COURT

As attorney for one charged by a grand jury with having filed a false noncommunist affidavit, petitioner mailed questionnaires to all federal employees on the grand jury in an effort to determine whether such employees were inclined to indict those accused of being Communists as a result of the federal government's loyalty program. For this action, which was taken without the knowledge or permission of the court, petitioner was found guilty of contempt under a statute providing that a federal court has power to punish as contempt "Misbehavior of any of its officers in their official transactions." 18 U.S.C. § 401 (2) (1952). On certiorari to the Supreme Court, *held,* reversed. An attorney is not an officer of the court within the meaning of 18 U.S.C. § 401 (2). *Cammer v. United States,* 76 S.Ct. 456, 100 L.Ed (Advance p. 340), (1956).

Historically, a lawyer is an officer of the court. *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); *United States v. Landes,* 97 F.2d 378 (2d Cir. 1938). See also *United States v. Maresca,* 266 F. 713 (S.D.N.Y. 1920) (United States Attorneys are officers of federal court and have the same status as other members of the bar); *In re Terry,* 36 F. 419 (C.C. Cal. 1888) (attorney is an officer of the court even while he is a litigant); *Sharon v. Hill,* 24 F. 726 (C.C. Cal. 1885) (statute providing punishment for impeding an officer of the court applies to one who threatened attorney). It has been specifically held that attorneys are officers of the court within the meaning of the statute involved in the instant case. *Farese v. United States,* 209 F.2d 312 (1st Cir. 1954) (But case restricts meaning of "official transactions" to acts of counsel in courtroom); *Ex parte Davis,* 112 F. 139 (C.C.Fla. 1901). See also *Schmidt v. United States,* 124 F.2d 177 (6th Cir. 1941).

As officers of the court, attorneys are responsible to the court for professional misconduct. *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1867); *Ex parte Wall,* 107 U.S. 265, 2 S.Ct. 569, 27 L.Ed. 552 (1882). Attorneys become subject to the summary jurisdiction of the courts by committing any act of official or personal dishonesty or oppression. *Ex parte Bradley,* 74 U.S. (7 Wall.) 364, 19 L.Ed. 214 (1869). And this is recognized by the Act of 1831 (now 18 U.S.C. § 401) which, "after providing for personal contempt in the presence of the court, authorizes attachments to issue, and summary punishment to be inflicted for 'the misbehavior of the officers of said courts in their official transactions'." Id, at 374. "Courts have always allow-

ed the summary remedy of an attachment to compel an attorney to observe the duties incident to his professional relations toward his clients, and towards the other officers of the court . . . . " *Bogart v. Electrical Supply Co.,* 27 F. 722, 723 (C.C.N.Y. 1886). But the purpose of the Act of 1831 was to curtail drastically the range of conduct which federal courts can punish as contempt. *In re Michael,* 326 U.S. 224, 66 S.Ct. 78, 90 L.Ed. 30 (1945). To same effect see *Bessette v. W.B. Conkey Co.,* 194 U.S. 324, 24 S.Ct. 665, 48 L.Ed. 997 (1904); *Ex parte Robinson,* 86 U.S. (19 Wall) 505, 22 L.Ed. 205 (1874).

The federal courts have differed on the question whether the statute forbids punishment by contempt for acts not committed in the presence of the court. Illustrative of the decisions answering this question in the negative are those upholding the power of the court to hold in contempt persons publishing unfavorable comment on a pending cause. See for example, *United States v. Markewich,* 261 F. 537 (S.D.N.Y. 1919) (attorney); *Toledo Newspaper Co. v. United States,* 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186 (1918) (newspapermen). And the contempt conviction of an attorney who accosted a juror outside the courthouse after the jury had been discharged was upheld in *Tanner v. United States,* 62 F.2d 601 (10th Cir. 1933). But the weight of authority is to the effect that the Act of 1831 deprived the federal courts of power to punish as contempt acts committed outside the presence of the court. See *United States v. Holmes,* 26 Fed. Cas. 360, No. 15, 383 (C.C.Pa. 1842) and *Ex parte Poulson,* 19 Fed. Cas. 1205, No. 11, 350 (C.C.Pa. 1835) (publication of comment on pending cause). And see *Nye v. United States,* 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172 (1940), overruling *Toledo Newspaper Co. v. United States, supra,* and thereby upholding a strict construction of the statute.

The decision of the Court in the instant case seems eminently sound in view of the history of the statute involved. The act of 1831 was passed promptly after the nearly successful impeachment of a federal judge who had imprisoned and suspended from practice a lawyer who published a criticism of the judge's opinion in a particular case. Further, the attorney is subject to disbarment or suspension for professional misconduct, and under the first and third sections of 18 U.S.C. § 401 is subject to be held in contempt for misbehavior in the presence of the court or for disobedience or resistance to a lawful order of the court. Also, 18 U.S.C. § 1504 provides for indictment of those guilty of attempting to influence the action of a juror by written communications. As the Court in the instant case observed, if a lawyer

were held to be an officer of the court within the second section of the statute, he *could* be held to be engaged in an "official transaction" whenever acting in the practice of the profession, and consequently subject to fine or imprisonment without indictment or jury trial. The further danger that the attorney might not have the benefit of an impartial tribunal in such a case has been lessened by the provision of 18 U.S.C. Rule 42 (Fed. R. Crim. P. 42) that a judge is disqualified if the contempt charged involves disrespect to or criticism of himself. The decision of the court prevents a result obviously contrary to the intent of Congress and detrimental to the prized and necessary independence of the bar.

ROCK T. SPENCER

FEDERAL PROCEDURE-DIVERSITY JURISDICTION—STATUS OF PUERTO RICO

Plaintiffs, citizens of Puerto Rico, brought a tort action in a Federal District Court in Illinois against citizens of Illinois with jurisdiction predicated on diversity of citizenship as provided in 28 U.S.C. § 1332 (1952). Defendants moved to have complaint dismissed for want of jurisdiction. The district court dismissed the complaint on the ground that Puerto Rico, now a "commonwealth," was no longer a territory within the definition of "states" for purpose of federal diversity jurisdiction. On appeal, *held*: reversed. Although the new Puerto Rican constitution changed the status to a "commonwealth" it is still a territory within the meaning of the diversity section of the federal code of civil procedure. *Detres v. Lions Building Corporation,* 234 F.2d 596 (7th Cir. 1956).

A territory is a "portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States." *New York ex rel. Kopel v. Bingham,* 211 U.S. 468, 475, 29 S. Ct. 190, 192, 53 L.Ed. 286, 289, (1911). However the word "territory" may have different meanings depending on the character and aim of the congressional act. *Puerto Rico v. Shell Co.,* 302 U.S. 253, 58 S.Ct. 167, 86 L.Ed. 235 (1937). As used in the Sherman Anti-Trust Act it includes Puerto Rico, *Ibid.* Also Puerto Rico is a territory under a Federal statute that provides for the demand and surrender of fugitive criminals by governors of territories as well as states. *Kopel* case *supra.* But it is not a territory

within the reach of the sixth and seventh amendments of the Federal Constitution. *Balzac v. Porto Rico,* 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627 (1922). The Federal diversity statute, 28 U.S.C. § 1332 (1952), gives district courts jurisdiction where the controversy is between "citizens of different states," and defines "states" to include the "territories and the District of Columbia." However under a recent statute Puerto Rico became a "commonwealth," 66 STAT. 327, 48 U.S.C. § 731d (1952). Although the status of commonwealth is not the same as that of a state of the union, it may be considered as a "state" for some purposes. *Mora v. Mejias,* 206 F.2d 377 (1st Cir. 1953) (dictum). Under an act of congress requiring a three judge court to enjoin a state statute Puerto Rico is treated as a state and not a territory. *Mora v. Mejias,* 115 F. Supp. 610 (P. R. 1953). But Federal laws applicable to Puerto Rico before passage of the Constitution continue to apply. *Consentino v. International Longshoremen's Assn.,* 126 F.Supp. 420 (P.R. 1954), (dictum that Congress, to make future statutes applicable to Puerto Rico, will have to refer to it by some term other than "territory").

Although Puerto Rico does occupy a new and unique status, the instant case appears to be correctly decided. Whether it is a state, territory or commonwealth, the historical reason for the creation of diversity jurisdiction, to provide an impartial forum, still applies. The more important question is whether Puerto Rico, in its present status, will be considered a state where the legislation distinguishes between a state and territory. For here exists a hybrid, in the words of Congressman McCormick ". . . something intermediary between the territorial statutes and statehood." It is submitted that the commonwealth, which has complete autonomy in all local matters, is much more similar to a state of the union than it is to a territory.

STANLEY R. SEGAL

INSURANCE—PUBLIC POLICY—EFFECT OF INSURED BEING EXECUTED

Plaintiff was the beneficiary of insurance policies on the life of an insured who was lawfully executed under state law. This action was brought to recover full value of the life insurance policies. Defendant had offered to pay the amount of the premiums, but would not pay the full amount on the grounds that the execution of insured was not a risk assumed under the policy and payment would be contrary to public policy. *Held,* plaintiff should recover full amount because it is the named beneficiaries who suffer the most by the execution of the insured and the knowledge that his life insurance will be cancelled

is not a sufficient deterrent to murder. *Tarrance v. John Hancock Mutual Life Insurance Company,* 139 F. Supp. 769 (W.D. Ky. 1956).

There can be no recovery for legal execution on grounds of public policy, even if the insured was later found to have been innocent. *Burt v. Union Central Life Insurance Company,* 187 U.S. 362, 23 S.Ct. 139, 47 L.Ed. 216 (1902), *Northwestern Mutual Life Insurance Company v. McCue,* 223 U.S. 234, 32 S.Ct. 220, 56 L.Ed. 419 (1912). There is no recovery for death at the hands of the law. COUNCH, INSURANCE § 1133 (1929). Public policy prevents recovery even if there is no clause in the policy expressly covering the point. *Millen v. John Hancock Mutual Life Insurance Company,* 300 Mass. 83, 13 N.E. 2d 950 (1938). Another reason prohibiting recovery is that there is an implied obligation that the insured will do nothing to hasten maturity of the policy. *Sullivan v. Prudential Insurance Company of America,* 131 Me. 228, 160 A. 777 (1932). Even a statute requiring an incontestable clause does not alter public policy of no recovery. *American National Insurance Company v. Munson,* 202 S.W. 987, (Tex. Civ. App. 1948). The English rule is not to allow recovery. *The Amicable Society v. Bollard,* 4 Bligh (N.S.) 194 5 Eng. Reprint 70 (1830). But there are authorities which maintain that the preferable view is to allow recovery. VANCE, INSURANCE § 96 (3rd Ed. 1951). It would be unconstitutional and would work corruption of blood not to allow recovery. *Fields v. Metropolitan Life Insurance Company.* 147 Tenn. 464, 249 S.W. 798, 36 A.L.R. 1250 (1923), *Collins v. Metropolitan Life Insurance Company,* 232 Ill. 37, 83 N.E. 542, 14 L.R.A. (N.S.) 356 (1907). Recovery in this type case is prohibited by statute in Georgia, GA. CODE § 56-909 (1933). Also courts in Georgia will enforce provisions in policies excluding or limiting liability for legal execution. *Doubrly v. Carolina Life Insurance Company,* 58 Ga. App. 178, 198 S.E. 76 (1938). However under an incontestable clause in a policy, the insurer is not released when insured dies at the hands of the law. *Murphy v. Metropolitan Life Insurance Company,* 152 Ga. 393, 110 S.E. 178 (1922).

Public policy is by far the most persuasive reason given for denying recovery when the insured is legally executed. At first impression it may appear that it is bad policy to allow an executed criminal's life insurance to be paid in full. Upon closer examination it seems that this result is not detrimental. Although in the past, recovery has been denied much more than it has been granted, there appears to be a definite trend for allowing recovery. The latter view seems to be the best view from a standpoint of everyone concerned.

JOHN H. HICKS

INTERNATIONAL LAW—TRADE MARKS—EXTRATERRITORIAL APPLICATION

Plaintiff, an American manufacturer, brought suit against defendant, a Canadian manufacturer, in the District Court of the Southern District of New York, alleging infringement of American trade-mark by a Canadian mark, and unfair competition from sales of infringing goods. The District Court dismissed the complaint for lack of federal jurisdiction and inconvenience of forum. On appeal, *held*, the complaint did not state a cause of action arising under laws of the United States, but as a diversity action, the court should have retained jurisdiction over claims based on sales made in the United States. *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956).

"Any person who shall, *in commerce* (a) use, without the consent of the registrant, . . . [any trade-mark or imitation thereof] . . . shall be liable to a civil action by the registrant. 60 Stat. 427 (1946), 15 U.S.C. § 1114 (1) (1952), (The Lanham Act) (emphasis added). "The Congress shall have Power . . . to regulate commerce with foreign nations, and among the several states and with the Indian Tribes." U. S. CONST. art. I, § 8 p. 3. The commerce power extends to all commerce between the states or the United States and foreign countries. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L.Ed. 893 (1937). As a general rule, the jurisdiction and authority of a nation are confined within the bounds of its own territory, *The Schooner Exchange v. McFadden*, 7 Cranch (U.S.) 116, 3 L.Ed. 287 (1812), and no court can by its judgments or decrees directly bind or affect property or persons beyond the limits of that state. *Brown v. Fletcher*, 210 U.S. 82, 28 S. Ct. 702, 52 L. Ed. 966 (1908). However, a court which has jurisdiction in personam has power to require the defendant to do, or refrain from doing, anything beyond the limits of its territorial jurisdiction which it might require to be done or omitted within the limits of such territory. *French v. Hay*, 22 Wall. (U.S.) 238, 22 L. Ed. 854 (1874). And "any state may impose liabilities even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). An American court has "directed" a foreign corporation from asserting rights it may have in its country "since the enforcement of those rights will serve to continue the effects of wrongful acts it has committed within the United States affecting the foreign trade of the United States." *United States v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215, 228 (S.D.N.Y.

1952). The foreign court, however, disregarded the order directing disposition of industrial property because it was an attempt to "assert an extra-territorial jurisdiction which the courts of this country cannot recognize . . . " *British Nylon Spinners Ld. v. Imperial Chemical Industries Ld.* [1953] 1 Ch. 19, 24. But the fact that the subject matter of a suit is situated in a foreign country will not deprive a court of equity of the United States of jurisdiction, *Vacuum Oil Co. v. Eagle Oil Co.,* 154 F. 867 (C.C. D. N. J. 1907), and a citizen of the United States cannot avoid the effects of the Lanham Act, *supra,* by virtue of the fact that his acts are done outside the territorial limits of the United States. *Steele v. Bulova Watch Co.,* 344 U.S. 280, 73 S. Ct. 252, 97 L. Ed. 319 (1952). Affixing a trade-mark in this country on goods and sending them into foreign commerce is a violation of the Lanham Act, irrespective of whether if the label were affixed in a foreign country it would violate American laws. *Hecker H-O Co. v. Holland Food Corp.,* 36 F.2d 767 (2d Cir. 1929). But, if one has established a legal right to the use of a trade-mark in a foreign country a plaintiff cannot recover damages for acts done in the United States resulting in a sale of merchandise in that country. *George W. Luft Co. v. Zande Cosmetic Co.,* 142 F.2d 536 (2d Cir. 1944). The Supreme Court has expressed the view that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909) (refusing to extend the Sherman Act to cover acts in Costa Rica). Foreign law confers no privilege in this country that our courts are bound to recognize, see *United Drug Co. v. T. Rectanus Co.,* 248 U.S. 90, 39 S. Ct. 48, 63 L. Ed. 141 (1918), and a prior use of a trade-mark in a foreign country does not entitle its owner to claim exclusive trade-mark rights in the United States against one who in good faith has adopted a like trademark here prior to the entry of the foreigner into the market. *Gorham Mfg. Co. v. Weintraub,* 196 F. 957 (D.C.S.D.N.Y. 1912). A trade-mark started elsewhere depends for its protection in a foreign jurisdiction on the law prevailing therein and confers no right except by consent of that law. *Ingenohl v. Walter E. Olsen & Co.,* 273 U.S. 541, 47 S. Ct. 451, 71 L. Ed. 762 (1927). "If a state can take jurisdiction over acts committed abroad by foreigners because they have consequences within its territory and it reprehends such acts, the door is open to an almost unlimited extension of its extraterritorial jurisdiction." Haight, *International Law and Extraterritorial Application of the Antitrust Law,* 63 YALE L. J. 639, 641 (1954).

The main point of the instant case is that infringement remedies

of the Lanham Act cannot be applied to acts committed by a foreign national in his home country under a presumably valid trade-mark registration in that country, because Congress did not intend that the Lanham Act be so applied. The case is distinguishable on its facts from the *Aluminum, Imperial Chemical,* and *Bulova* cases. Even so, it represents a departure from the trend represented by those cases. In view of the "exclusive sovereignty" doctrine, whatever one may think of that doctrine itself, the result of the case is a fortunate one. But as has been pointed out, international law is still in its infancy in regards to problems of this type. This case stands for the status quo. The above mentioned cases represented a step away from the "exclusive sovereign" doctrine. Whatever should be the final disposition of this case (assuming certiorari will be applied for), future cases involving similar problems will probably be more in line with the *Aluminum* case, because the problem is inherent in the complexities of the modern world, and courts of any nation are loathe to stand by and see wrongs committed without remedies. When the problem has raised enough public interest the solution will probably be found in reciprocal legislation.

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